

APPELLATE CIVIL.

1913
July, 21.

Before Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

HARIBANS RAI AND OTHERS (JUDGMENT-DEBTORS) v. SRI NIWAS NAIK
(DECREE-HOLDER).^a

Civil Procedure Code (1908), order XXXIV, rule 14—*Execution of decree—Usufructuary mortgage—Suit for possession of mortgaged property—Decree for possession and costs—Execution for costs by attachment of part of mortgaged property.*

Certain usufructuary mortgagees suing for possession of the mortgaged property, which had not been delivered to them, obtained a decree for possession and for costs. In execution of their decree for costs the mortgagees applied for attachment of part of the mortgaged property. *Held* that this application was not barred by the provisions of order XXXIV, rule 14, of the Code of Civil Procedure, 1908. *Khia Rajmal v. Daim* (1) distinguished. *Muhammad Abdul Rashid Khan v. Dilsukh Rai* (2) referred to.

THE facts of this case were as follows :—

The appellants and their predecessors in title executed a usufructuary mortgage in favour of one Subba Rai on the 3rd of October, 1887. The mortgage was assigned to Sri Niwas Rai Kalia and others, the respondents. Part of the property mortgaged was in the possession of prior mortgagees and the mortgagors also held mortgagee rights in other property which they included in the mortgage. In regard to those two descriptions of property, it was provided in the mortgage that the mortgagors would redeem the prior mortgage and foreclose the mortgage held by them and then deliver possession to their mortgagee, Subba Rai. The mortgagors complied with the terms of the mortgage so far that they redeemed the prior mortgage and foreclosed the mortgage held by them, but they did not deliver possession to the mortgagee. Thereupon the assignees of the mortgagee brought a suit for possession and obtained a decree, which awarded them costs. In execution of this decree for costs, they applied for attachment of the mortgaged property, that is, of the equity of redemption of the mortgagors in respect of the said property. The appellants objected to the attachment on the ground that it would contravene the provisions of order XXXIV, rule 14, of the Code of Civil Procedure, and that as the mortgagees are in possession under the

^a First Appeal No. 237 of 1912 from a decree of Ali Ausat, officiating Subordinate Judge of Ghazipur, dated the 14th of June, 1912.

(1) (1904) I L. R., 32 Cal., 296.

(2) (1905) I. L. R., 27 All., 517.

mortgage, they were not entitled to bring to sale the mortgagors' rights. This objection was overruled by the court below, and the mortgagors thereupon appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellants.

Babu *Sital Prasad Ghosh* (with him Babu *Jogindro Nath Chaudhri*), for the respondents.

BANERJI, and RYVES JJ.:—The facts of this case are these:—The appellants and their predecessors in title executed a usufructuary mortgage in favour of one Subba Rai on the 3rd of October, 1887. The mortgage was assigned to Sri Niwas Rai Kalia and others, the respondents. Part of the property mortgaged was in the possession of prior mortgagees and the mortgagors also held mortgagee rights in other property which they included in the mortgage. In regard to these two descriptions of property, it was provided in the mortgage that the mortgagors would redeem the prior mortgage and foreclose the mortgage held by them and then deliver possession to their mortgagee, Subba Rai. The mortgagors complied with the terms of the mortgage so far that they redeemed the prior mortgages and foreclosed the mortgages held by them, but they did not deliver possession to the mortgagee. Thereupon the assignees of the mortgage brought a suit for possession and obtained a decree, which awarded them costs. In execution of the decree for costs, they have applied for attachment of the mortgaged property, that is, of the equity of redemption of the mortgagors in respect of the said property. The appellants objected to the attachment on the ground that it would contravene the provisions of order XXXIV, rule 14, of the Code of Civil Procedure, and that as the mortgagees are in possession under the mortgage, they are not entitled to bring to sale the mortgagors' rights. This objection having been overruled by the court below, this appeal has been preferred, and the same plea has been reiterated in the appeal. In our opinion, the decision of the court below is right. Rule 14 of order XXXIV of the Code of Civil Procedure provides that "where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage." The question is whether the

1913

HARIBANS
RAI
v.
SRI NIWAS
RAI.

1913

HARIBANS
RAI
v.
SRI NIWAS
NATH.

decree in this case is "a decree for the repayment of money in satisfaction of a claim arising under the mortgage." While it is contended on behalf of the appellant that as the decree for costs was passed in a suit brought in connection with the mortgage, and is, therefore, a decree in respect of a claim arising under the mortgage, it is urged, on the other hand, that the claim which the decree-holder seeks to satisfy is not a claim arising under the mortgage, but a claim arising under a decree passed for costs. In our opinion, this latter contention is correct. Rule 14 seems to us to provide for cases in which the decree-holder seeks to satisfy a claim which he could enforce by virtue of his mortgage. This rule, in our opinion, gives effect to the principle of equity referred to by their Lordships of the Privy Council in *Khivraj-mal v. Daim* (1) in the following terms:—"Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that the mortgagee cannot, by obtaining a money decree for the mortgage-debt, and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his rights to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage." In the present case the suit which the decree-holders brought was no doubt a suit relating to the mortgage, but the costs awarded were costs which could only be realized by virtue of the decree made by the court and the claim for the costs is not a claim which arose under the mortgage. The case is in some respects similar to that of *Muhammad Abdul Rashid Khan v. Dilsukh Rai* (2). The learned counsel for the appellants also urged that under the terms of the mortgage deed the costs in question might be regarded as part of the mortgage money. We have considered the terms of the mortgage, and it is clear that the costs referred to in that document are costs relating to the redemption of prior mortgages or to the obtaining of mutation of names in respect of the mortgaged property which the mortgagees might incur as against third parties or in making applications themselves for entry of their names. This document does not contemplate costs of the description of costs now sought to be realized. The costs incurred by a mortgagee

(1) (1904) I. L. R., 32 Cal., 296; (2) (1905) I. L. R., 27 All., 517.

which might be deemed to be a part of the mortgage money are the costs referred to in rule 10 of order XXXIV, i.e., the costs of a suit for a decree for foreclosure, or sale or redemption. The costs awarded in the present case are not costs of this description, and therefore they could not be deemed to be a part of the mortgage money which the mortgagees were entitled to realize from the mortgaged property.

Whether the mortgagees should be permitted to bid for and purchase at the sale to be held in execution of their decree, is a matter which the court executing the decree should consider in the event of the mortgagees applying for leave to bid, but in our opinion, their prayer for sale of the mortgagor's rights in the mortgaged property has been rightly allowed, and this appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Piggott.

UDIT TIWARI (PLAINTIFF) v. BIHARI PANDE (DEFENDANT)*.

Act (Local) No. II of 1901 (Agra Tenancy Act), section 199—Civil and Revenue Courts—Jurisdiction—Appeal—Question of proprietary right.

The plaintiff sued in the Revenue Court to eject the defendant alleging that the land in suit was his occupancy holding and that the defendant was his sub-tenant. The defendant pleaded that he was a co-sharer in the village and that the land in suit was his *khud-kasht*. Held that no question of proprietary title was raised by the pleadings, and that no appeal, therefore, lay to the District Judge from the order of the Assistant Collector who had decided the case in the first instance. *Dal Chand v. Shamla* (1) dissented from.

THE facts of this case were as follows :—

The plaintiff alleged that he was occupancy tenant of a certain plot and that the defendant had taken that plot, for purposes of cultivation, as sub-tenant from him. It was admitted by the plaintiff that the defendant was the proprietor of practically the whole village. The plaintiff brought this suit for ejectment in the Revenue Court. The defendant pleaded that he did not take the land as a sub-tenant of the plaintiff, but that he was cultivating it as a proprietor, as his *khud-kasht*. The Assistant

*Second Appeal No. 105 of 1913 from a decree of E. E. P. Rose, Additional Judge of Gorakhpur, dated the 20th of September, 1912, reversing a decree of Kamta Prasad, Assistant Collector, First Class, of Basti, dated the 7th of June, 1912.

(1) (1905) 2 A.L.J., 176.

1913

HARIBANS
RAI
v.
SRI NIWAZ
NAIR.

1913

July, 21.